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SUPREME COURT, U.S.

NO. 80-5818

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOHN B. MUMFORD, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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I.

The government's brief in opposition to the petition for a writ of certiorari recites at considerable length the facts underlying the civil and criminal proceedings against petitioner Mumford. However, the only significance of the factual setting for purposes of this petition is that the facts which formed the basis for both the civil action and the criminal action are identical. The government's brief does not dispute that the same proof, the same claims, the same documents and the same witnesses were presented against Mumford in both actions brought against him by the United States Government. It is the identity of the two causes of action based upon these facts which is controlling for purposes of applying the doctrines of res judicata and collateral estoppel.

II.

The District Court specifically found at the conclusion of the civil action against Mumford that the government failed to prove that Mumford had violated any of the federal securities laws. The Fourth Circuit affirmed this finding. Attempting to avoid this prior judgment on the merits in favor of Mumford, the government's brief argues two points. First, the government asserts that res judicata is inapplicable here because the SEC

proceeding against Mumford was "a civil, remedial action seeking wholly prospective relief" while the subsequent criminal prosecution sought "punishment for past acts." (Resp. Br. 9) In other words, the government contends that res judicata may never apply where one of the proceedings is civil and the other criminal. This Court has never so held. Mumford submits that, under a proper and traditional res judicata analysis, it is the identity of facts and issues which determines applicability of res judicata where, as here, the parties are the same in the first and second proceeding. The government's second argument is that collateral estoppel is inapplicable here to bar the criminal prosecution because the government did not have a full and fair opportunity to litigate in the first proceeding. This argument suits the government's purposes here but is inconsistent with the government's position on appeal in the civil action and is negated by the Fourth Circuit's affirmance of the judgment in Mumford's favor. In its appeal to the Fourth Circuit in the civil case, the government complained about evidentiary restrictions during the proceedings, but argued that the evidence it did present established clearly that Mumford had violated the securities laws. The Fourth Circuit, however, found no error in the conduct of SEC proceedings by the District Judge and affirmed the judgment in favor of Mumford. Securities and Exchange Commission v. John B. Mumford, No. 78-1386 (4th Cir., Feb. 22, 1980) (unpublished).

The District Court's Memorandum Opinion and Order in the prior civil action, affirmed by the Fourth Circuit, could not be more clear in its finding that the government failed to prove that Mumford violated any federal securities laws. The government's attempts to circumvent this order by reference to comments made during the civil proceeding by the U.S. District Judge completely ignore the well established principle that the court speaks only through its final order. Accordingly, here,

where the court had found against the government in an order not subject to differing interpretations, the government should have been precluded from a second attempt, by way of criminal prosecution, to prove the same claims on the same facts against the same defendant.

III.

The circumstances underlying this petition show that the parameters of the related doctrines of res judicata and collateral estoppel as applicable to the government and as applicable between civil and criminal proceedings require further definition by this Court.

There are four basic permutations with respect to the preclusive effect of judgments in civil and criminal proceedings: (1) where both proceedings are civil; (2) where both proceedings are criminal; (3) where the first proceedings is criminal and the second civil; and (4) where the first proceeding is civil and the second criminal.

In recent decisions, and particularly since Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 329 (1971), this Court has addressed many of these permutations in developing the res judicata and collateral estoppel doctrines. For example, where both proceedings are civil in nature, this Court has held that the government's failure in the first action estops it from bringing a second action, Montana v. United States, 440 U.S. 147 (1979), and that the government's success in the first civil action may be used offensively by subsequent civil litigants, Parklane Hosiery Company v. Shore, 439 U.S. 322 (1979). Where both proceedings are criminal in nature, this Court has held that the government's failure in prosecuting one defendant does not bar subsequent prosecution of another defendant on the same facts, Standefer v.

United States, ____ U.S. ____, 48 U.S.L.W. 4634 (June 9, 1980), but that the government is precluded by res judicata and collateral estoppel from prosecuting again a defendant who was acquitted in the first proceeding, Ashe v. Oppenheimer, 242 U.S. 85 (1916). Where the first proceeding is cr[illegible] and the second civil, this Court has applied collateral estoppel to bar the convicted defendant from bringing a subsequent civil action, Allen v. McCurry, ____ U.S. ____, 49 U.S.L.W. 4015 (December 9, 1980), and has held that a prior criminal conviction under the antitrust laws may be introduced in a subsequent civil antitrust action, Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

This petition presents the fourth permutation, a civil action preceding a criminal action, which needs to be addressed by this Court to further clarify the doctrines of preclusion. In Yates v. United States, 354 U.S. 298, 335 (1956), this Court agreed with the principle that the doctrine of collateral estoppel may apply where the first proceeding is civil and the second criminal. However, under the facts in Yates, this Court determined that there was no identity of issues in the two proceedings so that preclusion was there inapplicable. With respect to this petition, the government does not and cannot dispute that the facts and issues involved in the civil and criminal actions against Mumford are identical. The principle announced but not applied in Yates does apply here to preclude the government from bringing a second action on the same claims and facts against Mumford. The Fourth Circuit's decision not to apply the doctrines of preclusion in this case is, therefore, in conflict with Yates and should be reviewed upon a writ of certiorari.

This petition asks the Court to decide whether the government may proceed against a defendant a second time in a criminal proceeding, having once lost against that defendant on

the same facts and the same claims but under the less stringent standards of proof in a civil case. Certiorari should be granted in order to provide the answer.

Respectfully submitted,

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